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No. 08-1207

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

GEOFFREY, INC.,

*Petitioner*,

*v.*

COMMISSIONER OF REVENUE,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

# BRIEF IN OPPOSITION

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## QUESTION PRESENTED

A corporation licenses intangible property such as trademarks to an affiliated corporation for use by the affiliate within Massachusetts. The licensing corporation receives income from the licensee and concedes that it is "doing business" in Massachusetts and is therefore subject under state law to the corporate net income tax, a tax conceded by the taxpayer to be fairly apportioned, non-discriminatory, and fairly related to the services provided by the State. The question presented is whether the activity of the taxpayer has a "substantial nexus" with Massachusetts, as required by the Commerce Clause for the assessment of such a tax on a corporation engaged in interstate commerce, despite the fact that the taxpayer has no tangible property in the taxing State.

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## INTRODUCTION

Pursuant to Supreme Court Rule 15, respondent Commissioner of Revenue of Massachusetts submits this brief in opposition to the petition for a writ of certiorari. The writ should be denied because (1) the decision of the Massachusetts Supreme Judicial Court ("SJC") is consistent with the decisions of this Court and the requirement that a state tax be applied to "an activity with a substantial nexus with the taxing State"; (2) the decision of the SJC enlarges a growing consensus of the States' highest courts rejecting the claim that the Commerce Clause requires a "physical presence" in order to establish a "substantial nexus"; (3) the Court should not grant review based on mere speculation about burdens on interstate and foreign commerce; and (4) the Court should deny review in deference to the constitutional role of Congress in weighing burdens on interstate commerce.

## OPINIONS BELOW, JURISDICTION, AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts petitioner's citations to the opinions below and the constitutional and statutory provisions involved. Regarding the jurisdiction of the Court, respondent notes that the sole provision invoked by the petitioner, 28 U.S.C. § 1254(1), does not authorize review by this Court of a judgment of a state court.

## STATEMENT

### The Mass. Corporate Excise Tax

The respondent is the state official authorized to enforce the tax laws of Massachusetts. Mass. Gen. Laws ch. 14, §§ 1-3; ch. 62C, § 3. Among her duties is the enforcement of the corporate excise tax imposed on domestic and out-of-state corporations doing business in the Commonwealth. *See* Mass. Gen. Laws ch. 63, § 39 (foreign corporations). During the relevant years, Mass. Gen. Laws ch. 63, § 30, defined "foreign corporations" as:

> a corporation, association or organization established, organized or chartered under laws other than those of the commonwealth, for purposes for which domestic corporations may be organized . . . which has privileges, powers, rights or immunities not possessed by individuals or partnerships . . . .

Mass. Gen. Laws ch. 63, § 30(2) (1996 ed.). Chapter 63, § 39 provided in part:

> Except as otherwise provided herein, *every foreign corporation*, exercising its charter, or qualified to do business or *actually doing business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth, shall pay*, on account of each taxable year, *the*

*excise* provided in subsection (a) or (b) of this section, whichever is greater.

*The excise levied herein is due and payable on any one or all of the following alternative incidents:*

(1) The qualification to carry on or do business in this state or *the actual doing of business* within the commonwealth in a corporate form. The term "doing business" as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in the commonwealth, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling or procuring of services or property.

(2) The exercising of a corporation's charter or the continuance of its charter within the commonwealth.

(3) *The owning or using any part or all of its capital, plant or other property in the commonwealth in a corporate capacity.*

*It is the purpose of this section to require the payment of this excise to the commonwealth by foreign corporations for the enjoyment under the protection of the laws of the Commonwealth, of the powers, rights, privileges and immunities derived by reason*

> *of the corporate form of existence and operation.*
>
> . . .

Mass. Gen. Laws ch. 63, § 39 (1996 ed.)(emphasis added).

The Commissioner has the power under Mass. Gen. Laws ch. 14, § 6(1) to "make . . . and from time to time . . . revise . . . such reasonable regulations . . . as may be necessary to interpret any statute imposing any tax, excise or fee." One year after the decision of this Court in *Quill v. North Dakota*, 504 U.S. 298 (1992), the Commissioner promulgated 830 Code of Mass. Regs. (C.M.R.) § 63.39.1 to "describe[] the circumstances under which a foreign corporation is subject to the tax jurisdiction of Massachusetts under [Mass. Gen. Laws ch.] 63, § 39." 830 C.M.R. § 63.39.1(1)(a). App. 92a. Title 830 C.M.R. § 63.39.1(4) and (4)(d)(1) provide that "a foreign corporation must file a return in Massachusetts and pay the associated tax if . . . the corporation owns property that is held by another in Massachusetts under a lease, consignment, or other arrangement." App. 96a-97a; *see* 3 *MassTaxGuide--Corporate Excise* (Thomson West, 2007) at R-244 (setting forth history of relevant regulatory authority).

Specifically addressing intangible property, the Commissioner in 1996 issued Directive 96-2. *Id.* at PWS-214-16, App. 125a-130a. Directive 96-2 states the Commissioner's position regarding the application of the corporate excise to the ownership

and use of intangible property in the Commonwealth. The Directive states:

> A foreign corporation's intangible property used within Massachusetts will subject that corporation to the corporate excise when:
>
> 1. The intangible property generates, or is otherwise a source of, gross receipts within the state for the corporation, including through a license or franchise;
>
> 2. The activity through which the corporation obtains such gross receipts from its intangible property is purposeful (e.g., a contract with an in-state company); and
>
> 3. The corporation's presence within the state, as indicated by its intangible property and its activities with respect to that property, is more than *de minimis*.

App. 125a-126a. Directive 96-2 further states that "the definition of intangible property generally includes, but is not limited to, copyrights, patents, trademarks, trade names, trade secrets, service marks, and know-how." App. 126a.

A finding of constitutional "nexus" between the activities of an out-of-state corporation and Massachusetts does not subject all of the

corporation's net income to tax by the Commonwealth. A foreign corporation doing business within and without Massachusetts and subject to tax under § 39 may apportion its income among the States and thereby reduce its net income subject to tax in each State under the formula set forth in Mass. Gen. Laws ch. 63, § 38. Taxable net income is determined by taking the corporation's Federal net income, as defined in Mass. Gen. Laws ch. 63, § 30, applying statutory deductions enumerated in Mass. Gen. Laws ch. 63, § 38(a), and multiplying the result by the three-factor apportionment formula in G.L. c. 63, § 38(c). The apportionment formula is the "weighted average of three factors---property, payroll, and sales---commonly used to compare the value of business conducted within and without [Massachusetts]." *Gillette Co. v. Commissioner of Revenue*, 683 N.E.2d 270, 273 (Mass. 1997). "Each factor is a fraction in itself, the numerator of which is the local corporate property, payroll, or sales; the denominator of which is the corporation's total property, payroll, or sales 'everywhere' during the taxable year." *Id.*

**Proceedings before the Commissioner of Revenue, the Appellate Tax Board, and the Supreme Judicial Court**

Geoffrey failed to file tax returns under Mass. Gen. Laws c. 63, § 39 for the taxable years ending January 31, 1997 through January 31, 2001 for royalty income earned from its affiliate in Massachusetts for the use of Geoffrey's intangible property there. App. 7a, 24a. The Commissioner

assessed Geoffrey for taxes for the years at issue in the amount of approximately $ 3.1 million. App. 7a. Geoffrey sought an abatement of the tax. App. 7a, 25a. The Commissioner denied the application for abatement. App. 7a-8a.

Geoffrey appealed to the Massachusetts Appellate Tax Board (the "Board"). App. 8a, 25a. The Board affirmed the Commissioner. App. 8a, 40a-46a. The Board rejected the claim that the Commerce Clause requires the physical presence of the taxpayer in order to assess a net income or franchise tax. App. 40a. Relying on its decision in *Capital One Bank v. Comm'r of Revenue*, ATB Nos. C262391, C262598, 2007 WL 1810723 (Mass. App. Tax Board June 22, 2007), *aff'd*, 453 Mass. 1 (2008), *petition for cert. filed*, United States Supreme Court No. 08-1169, and several similar decisions involving Geoffrey and issued by other state courts, the Board ruled that there is no such requirement for such a state corporate excise tax under the Commerce Clause. App. 8a, 40a-46a. Turning to Geoffrey's presence in Massachusetts, the Board found that Geoffrey had "derived substantial economic gain" from the use of its property in the Commonwealth. App. 43a-44a. The Board found that the "good will represented by Geoffrey's Trademarks, which was carefully guarded, and the assurance of product quality they were intended to give, enabled transactions to occur in Massachusetts from which Geoffrey obtained substantial royalty income." App. 44a. The Board accordingly found that the "substantial nexus" required by the Commerce

Clause "was satisfied by" Geoffrey's "economic presence in Massachusetts." *Id.*

Geoffrey appealed the decision of the Board to the Massachusetts Appeals Court. App. 19a. The Supreme Judicial Court granted direct appellate review and affirmed. App. 1a, 2a, 19a. The SJC held that "substantial nexus can be established where a taxpayer domiciled in one State carries on business in another State through the licensing of its intangible property that generates income for the taxpayer." App. 11a. Relying on facts set forth in the next section of this brief, the SJC further concluded that "Geoffrey's activities established a substantial nexus with Massachusetts." App. 13a.

**Facts Concerning Geoffrey's**
**Activities in Massachusetts**

Pursuant to Supreme Court Rule 15, the respondent supplements petitioner's statement of the case with the following facts drawn from the decisions of the Board and the SJC.

Geoffrey was formed in 1984, as a wholly-owned subsidiary of Toys "R" Us, Inc. ("Toys Inc."). App. 3a-4a, 26a. Toys Inc. later transferred trademarks, trade names, and service marks to Geoffrey in exchange for stock. App. 4a, 26a. Among the transferred intellectual property were the "Toys 'R' Us" and "Kids 'R' Us" trademarks and the "Geoffrey" giraffe character logo. *Id.* A 1991 appraisal by Arthur Andersen & Co. placed the fair

market value of Geoffrey's intellectual property at $1.5 billion. App. 4a, 26a-27a.

During the years at issue, Geoffrey's entire business consisted of licensing its intellectual property to various Toys Inc. operating companies to use in furtherance of their retail operations. App. 4a, 27a. One such company was Toys "R" Us-Mass, Inc. ("TRUMI"), another wholly owned subsidiary of Toys Inc. App. 4a, 26a. During the years at issue, TRUMI operated twenty-six Toys "R" Us retail toy stores and Kids "R" Us retail children's clothing stores in Massachusetts. *Id.*. Pursuant to a license agreement dated May 3, 1992, Geoffrey licensed its intellectual property to TRUMI for use exclusively in Massachusetts in exchange for royalty payments to Geoffrey at a rate of three percent of TRUMI's net sales income at its Toys "R" Us stores, and two percent of its net sales income at its Kids "R" Us stores. App. 4a, 27a.

In February 1997, Geoffrey entered into a similar licensing agreement with Babies "R" Us, Inc. for the use of Geoffrey's "Babies 'R' Us" trademark. App. 5a, 28a. Babies "R" Us is a division of Baby Superstore, Inc., which is an affiliate of TRUMI. *Id.* During the years at issue, Babies "R" Us, Inc. operated three retail stores in Massachusetts. *Id.* Under the licensing agreement, Babies "R" Us, Inc. paid Geoffrey a royalty rate of one percent of net sales income for the fiscal year 1996, one and one half percent of net sales income for the fiscal year 1997, and two percent of net sales income for the duration of the agreement. *Id.*

Geoffrey derived over $33 million in royalties from the Massachusetts consumer marketplace during the years at issue. App 6a. Geoffrey's trademarks appeared on signage, store displays, and product packaging at Massachusetts Toys "R" Us, Kids "R" Us, and Babies "R" Us retail stores. *Id.*

Geoffrey also depended on quality control to protect its intellectual property and to maximize its royalty income. App. 5a-6a, 29a. Pursuant to the license agreements with TRUMI and Babies "R" Us, Geoffrey retained the right to preview and disapprove product samples and specifications, signs, labels, tags, packaging material, advertising and sales promotion materials, bills, catalogs, and pamphlets which displayed any of its intellectual property. App. 5a-6a, 29a. Geoffrey's royalty income of $33 million was dependent on both the appearance and the display of the intellectual property as well as the proper operations and cleanliness of the retail stores. App. 5a-6a, 29a-30a.

Finally, Geoffrey had access to both Massachusetts courts and federal courts located in Massachusetts, to protect its intellectual property and its right to royalty payments under the licensing agreements. App. 8a, 32a.

## REASONS FOR DENYING THE WRIT

### I. THE DECISION OF THE SJC IS CONSISTENT WITH *QUILL* AND THE REQUIREMENT IN *COMPLETE AUTO* THAT A STATE TAX BE APPLIED TO "AN ACTIVITY WITH A SUBSTANTIAL NEXUS WITH THE TAXING STATE."

#### A. The Decision of the SJC Is Consistent with *Quill*'s Express Limitation to Sales and Use Taxes.

Under the Commerce Clause, a State may tax a company engaged in purely interstate commerce provided that the tax is "[1] applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). In permitting the States to tax purely interstate commerce, *Complete Auto* overruled *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951)(striking down a Missouri tax on an interstate trucking company). *Id.* *Complete Auto* thus reaffirmed the principle that "interstate commerce may be made to pay its own way." *Id.* at 288-89 n.15.

Here, petitioner concedes that the tax is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. It challenges the tax only under the "substantial nexus" test.

The Court applied the substantial nexus test to the collection of a use tax in *Quill*. A use tax is typically imposed on the storage, use, or consumption of goods or services purchased outside the taxing State for storage, use, or consumption within the taxing State. *See* Mass. Gen. Laws ch. 64I, § 2. The company in *Quill* was an out-of-state mail order house that had no affiliates or representatives, and only *de minimis* tangible or intangible property in the taxing State. The only connection between the company and its customers in the taxing State was "by common carrier or the United States mail." *Quill*, 504 U.S. at 301 (quotation omitted). The Supreme Court of North Dakota had declined to follow *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753, 758 (1967)—another mail-order sales and use tax case—on the ground that the holding was "obsolete." *Id.* Although this Court in *Quill* agreed "with much of the state court's reasoning" and held that the tax satisfied due process, it reversed the state-court judgment, reaffirmed *National Bellas Hess*, and held that the lack of a physical presence by the taxpayer demonstrated a lack of "substantial nexus" under the Commerce Clause. *Id.*

The rule maintained in *Quill*, however, is not controlling here. In preserving the *National Bellas Hess* rule for sales and use taxes, this Court relied heavily on the principle of *stare decisis*. *Id.* at 311, 317-18. The Court observed that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first

time today." *Id.* at 311, 318. The Court also relied on factors specific to sales and use taxation and the mail-order industry: the Court stated that the rule in *National Bellas Hess* had "engendered substantial reliance and has become part of the basic framework of a sizable industry." *Id.* at 317. Relying on these factors, *Quill* reaffirmed that substantial nexus for a *sales or use tax collection duty* requires the physical presence of the taxpayer in the taxing State, *id.* at 316-17, but carefully noted that it "has not, in [its] review of other types of taxes, articulated the same physical-presence requirement . . . ." *Id.* at 314; *see id.* at 317 ("concerning other types of taxes we have not adopted a similar bright-line, physical presence requirement"). Justice Scalia's concurring opinion, which was joined by Justices Kennedy and Thomas, relied even more heavily on *stare decisis*. *Id.* at 320. Given the Court's express limitation of its holding, and the Court's substantial reliance on the principle of *stare decisis*, there is no basis for the claim that the decision below is in conflict with *Quill*.

### B. The Fact-Specific Ruling Below Is Consistent with *Complete Auto* Because the Petitioners' Activities Have a Substantial Nexus with Massachusetts.

The SJC correctly adhered to the Court's express limitation of *Quill* to sales and use taxes and applied the *Complete Auto* test without imposing a threshold requirement that petitioner have a physical presence in Massachusetts. App. 11a. *Complete Auto*'s substantive focus on "activities"

readily supports that judgment, given the petitioner's commercial contacts with Massachusetts and the use of its intangible property there, as detailed by the SJC. App. 13a.

The decision below thus represents a straightforward application of *Complete Auto*'s substantive focus on "activities." In the absence of a governing precedent like *Bellas Hess,* there is no warrant to transform the *Complete Auto* nexus test to demand physical presence as the *sine qua non* of corporate income taxation. Under petitioner's theory, a business owning and leasing to another a storefront in Massachusetts, and generating $100,000 of revenue from the lease, would have physical presence in Massachusetts and thus be subject to taxation. Yet a firm such as the petitioner, receiving millions of dollars of revenue from royalty payments from firms licensed to use its intangible property in Massachusetts, would be immune from a fairly apportioned, non-discriminatory corporate excise tax. This result is not compelled by *stare decisis*, as in *Quill* (in light of *Bellas Hess*). Indeed, it conflicts with the focus on substance required by *Complete Auto*, which generally requires that interstate commerce "pay its own way." *Id.* at 288-89 n.15. The decision of the SJC is fully consistent with *Complete Auto* and does not warrant review by this Court.

## II. RATHER THAN CREATING A CONFLICT AMONG STATE COURTS, THE DECISION OF THE SJC ENLARGES A GROWING CONSENSUS OF THE STATES' HIGHEST COURTS REJECTING THE CLAIM THAT THE COMMERCE CLAUSE REQUIRES A "PHYSICAL PRESENCE" IN ORDER TO ESTABLISH A "SUBSTANTIAL NEXUS."

In determining whether to grant certiorari, the Court generally requires that a conflict of decisions be "real and embarrassing." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955) (quotation omitted). In this case, there is no conflict of sufficient degree or type. The overwhelming majority of state courts that have addressed the issue since the decision in *Quill* in 1992 have held that a physical presence is not required for a State to impose a fairly apportioned, non-discriminatory net income tax on corporations doing business in the taxing State. No state supreme court has held otherwise. Petitioner claims that there "is a mature, well-recognized, and entrenched split of authority among the state courts on the question" presented. Pet. 16. However, the three intermediate appellate court decisions cited by the petitioner are all at least nine years old and do not establish a current and significant conflict of state authority. In fact, any conflict of state decisions, if it had ever reached maturity, is now well past its shelf life.

A year after the decision in *Quill*, the South Carolina Supreme Court upheld an income-based tax

under the Commerce Clause, ruling that substantial nexus was created by the use of the taxpayer's trademarks within the taxing State. *See Geoffrey, Inc. v. South Carolina Tax Comm'n*, 437 S.E.2d 13, 18 (S.C.), *cert. denied*, 510 U.S. 992 (1993). The court held that "by licensing intangibles for use in this State and deriving income from their use here, Geoffrey has a 'substantial nexus' with South Carolina." *Id.* In the seventeen years after *Quill*, the clear majority of the state courts that have addressed the issue have similarly declined to apply a physical presence requirement to an income-based tax, in many cases brought by the petitioner here and involving the licensing of intangible property. *See Geoffrey, Inc. v. Okla. Tax Comm'n*, 132 P.3d 632, 638 (Okla. Civ. App. Ct. 2006)(trademark licensing); *Lanco, Inc. v. Dir., Div. of Taxation*, 908 A.2d 176, 177 (N.J. 2006), *cert. denied*, 127 S.Ct. 2974 (2007)(same); *A&F Trademark, Inc. v. Tolson*, 605 S.E.2d 187, 195 (N.C. Ct. App. 2004), *cert. denied*, 546 U.S. 821 (2005)(same); *Kmart Props., Inc. v. Taxation and Revenue Dep't*, 131 P.3d 27 (N.M. Ct. App. 2001), *cert. granted*, 40 P.3d 1008 (N.M. 2002), *cert. quashed*, 131 P.3d 22 (N.M. 2005) (same); *Bridges v. Geoffrey, Inc.*, 984 So.2d 115 (La. Ct. App. 2008) (same); *Secretary, Dep't of Revenue v. Gap (Apparel), Inc.*, 886 So.2d 459, 462 (La. Ct. App. 2004) (same); *Comptroller of the Treasury v. SYL, Inc.*, 825 A.2d 399 (Md. 2003)(same); *see also General Motors Corp. v. City of Seattle*, 25 P.3d 1022, 1029 (Wash. Ct. App. 2001); *Couchot v. State Lottery Comm'n*, 659 N.E.2d 1225, 1230 (Ohio 1996)("no indication in *Quill* that the Supreme Court will extend the physical presence requirement to

cases involving taxation measured by income derived from the state"); *Borden Chems. & Plastics v. Zehnder*, 726 N.E.2d 73, 80 (Ill. App. Ct. 2000)("Plaintiff argues that in *Quill*, the Supreme Court 'left open' the question of whether a physical presence is required in order to satisfy the substantial nexus requirement in other tax cases. We disagree."); *Buehner Block Co. v. Wyoming Dep't of Revenue*, 139 P.3d 1150, 1158 n.6 (Wyo. 2006) (*Bellas Hess* and *Quill* "created [a] specialized jurisprudence" applicable to "sales and use tax case[s]").

In similar cases involving out-of-state credit card companies, the two state supreme court decisions on point agree. *Capital One Bank v. Commissioner of Revenue*, 899 N.E.2d 76 (Mass. 2009), *petition for cert. filed*, (U.S. March 18, 2009) (No. 08-1169); *Tax Comm'r of W. Va. v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226 (W. Va. 2006), *cert. denied sub nom. FIA Card Services, N.A. v. Tax Comm'r of W. Va.*, 127 S.Ct. 2997 (2007). *MBNA Am. Bank* held that (1) *Quill* was "grounded primarily on *stare decisis*, (2) the Court "appears to have expressly limited *Quill*'s scope to sales and use taxes," and (3) "franchise and income taxes . . . do not appear to cause the same degree of compliance burdens." *Id.* at 232-33; *see also MBNA Am. Bank, N.A. v. Ind. Dep't of State Revenue*, 895 N.E.2d 140 (Ind. Tax Ct. 2008) (citing West Virginia *MBNA Am. Bank* decision and rejecting requirement of physical presence).

Petitioner claims that the "decision below conflicts directly with the state appellate court rulings in Tennessee, Michigan, and Texas," but tells only part of the story. Pet. 16. These older decisions by state intermediate appellate courts[1] do not establish a conflict of authority that is worthy of review.

Only one of the three decisions cited by the petitioner strikes a State's franchise or income tax because of a lack of physical presence by the taxpayer in the taxing State. *See J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831, 840-41 (Tenn. Ct. App. 1999), *cert. denied*, 531 U.S. 927 (2000). However, a later decision by the same intermediate appellate court cautions against too broad a reading of the decision in *J.C. Penney*. *America Online, Inc. v. Johnson*, No. M2001-00927-COA-R3-CV, 2002 WL 1751434 at *2 (Tenn. Ct. App. July 30, 2002), declined to read *J.C. Penney* to "substitute 'physical presence' for 'nexus' as the first prong of the *Complete Auto Transit* test" in a challenge to a tax on an internet service provider. Petitioners claim that in *America Online* "Tennessee has not retreated from the holding in *J.C. Penney*," Pet. 22-23, but the implication of *America Online* is clear: *J.C. Penney*

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[1] United States Supreme Court Rule 10(b) generally limits the Court's consideration of a conflict of state decisions to those by "the highest court of a state." *Id.* Thus, the Court "tries to achieve uniformity in federal matters only among the various courts whose decisions are otherwise final in the absence of Supreme Court review." R.L. Stern, *et al.*, *Supreme Court Practice* (9th ed. 256).

stands alone among the States and the decision has limited force even on its home field. *Cf. Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of [a lower court] to reconcile its internal difficulties.").

Nor does the 1993 decision of the Michigan Court of Appeals in *Guardian Industries Corp. v. Department of Treasury*, 499 N.W.2d 349 (Mich. App. 1993), demonstrate a significant split of state authority. *Guardian* did not strike down any tax, much less resolve the issue presented here. Rather, it involved the question whether certain taxpayers with undeniable physical presence in Michigan could exclude from Michigan's "single business tax" certain of its "sales" of tangible personal property outside Michigan on the ground that they were taxable in other States. *Id.* at 352, 353. In the unusual posture in which the case arose, it was the taxpayers that urged that their nexus in other States was sufficient for taxation by those States; Michigan argued that nexus was insufficient in those States, and the taxing authorities in the other States were not involved in the case. One taxpayer stipulated that its activities in the non-Michigan States were limited to mere solicitation, and so was found not to be taxable there by the non-Michigan States. *Guardian* thus turned on whether the level of these activities forfeited the statutory immunity conferred by P.L. 86-272, 15 U.S.C. § 381, not whether they reached the threshold level of constitutional nexus. *Guardian* thus does not hold that a state income or franchise tax requires a physical presence; at most, it holds that in some circumstances a tax on a

company whose in-state activities do not exceed the solicitation of sales of tangible goods may be foreclosed by a federal law limiting state taxation, such as P.L. 86-272. But that issue is not the same as that presented here. Finally, *Guardian* has little remaining force even in Michigan: the Michigan legislature has eliminated the tax at issue in *Guardian* and enacted a new tax that does not require a physical presence. MCL 208.1200(1).

Nor does the 2000 decision of the Texas Court of Appeals in *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296 (Tex. App. 2000), establish a current and significant conflict. In striking down the application of a state franchise tax, the Texas intermediate appellate court repeatedly stressed that the State had applied its franchise tax "solely" on the basis of the taxpayer's passive possession of a "certificate of authority" to do business in Texas. *Id.* at 298, 299, 300.[2] Despite broader *dicta*, therefore, *id.* at 300, *Rylander* does not strike an income or franchise tax where the State relies on active licensing of a taxpayer's valuable intangible property

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[2] Texas relied on the certificate of authority because it was state "*policy*" that "the licensing of intangibles, including patents, in Texas did not create franchise tax nexus." *Id.* at 302 (emphasis in original). Thus, Texas did not rely on the patent royalty payments that Bandag received from its Texas affiliate. The court indicated that the taxpayer's "sole activity" of relevance connecting it to Texas was "communication by United States mail and common carriers," without identifying any economic activity (except perhaps its licensing activities, which Texas did not count) that was the subject of such communication. Id. at 300.

for use within the taxing States, where the taxpayer derives substantial royalty income from such use.

In sum, the decisions of the state courts do not demonstrate "a mature, well-recognized, and entrenched split of authority." Pet. 16. They represent instead (1) a growing consensus among recent decisions and (2) minor historical anomalies from States that have joined or might later defer to the recent and clear trend. *Cf. Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co.*, 153 F.3d 938, 943 (9th Cir. 1998) ("Because of the importance of predictability to commercial relations, as well as deference to our sister circuits, we shall not lightly create an intercircuit conflict affecting commerce nationally."). For these reasons, the decisions cited by petitioners do not support plenary review of the issue presented at this time.

## III. THE COURT SHOULD NOT GRANT REVIEW BASED ON MERE SPECULATION ABOUT BURDENS ON INTERSTATE AND FOREIGN COMMERCE.

### A. Speculative Claims About an "Undue Burden" on Interstate Commerce Do Not Support Plenary Review of the Issue Presented.

Petitioner argues that the rule applied by the SJC will have "severe economic implications." Pet. 33. It claims that a corporation will be unable "to order its business affairs and determine in what

States it can be subject to state income and franchise tax." Pet. 34. For the reasons stated below, these alleged burdens on interstate commerce do not justify plenary review in this case.

The SJC correctly rejected the same exaggerated predictions of doom by corporate net-income taxpayers and *amici curiae* in the related case of *Capital One Bank*. Contrasting the sales and use taxes addressed in *Quill*, the SJC stated that "an income-based excise . . . typically is paid only once a year (except when quarterly estimated taxes are required), to one taxing jurisdiction on the state level, and the payment of such an excise does not entail collection obligations *vis-à-vis* consumers." 899 N.E. 2d at 85 n.17 (citations omitted). The SJC continued:

> Determinations about whether the [banks] are subject to the [tax] . . . or how to apportion income from business activity that is taxable within [Massachusetts] are the sorts of decisions that, more broadly, can confront all taxpayers, local or out-of-state, when calculating, reporting, and paying taxes on their income. While the making of these determinations is certainly more complex for large corporate taxpayers, it is part of the cost of doing business and is not, in our opinion, unduly burdensome on interstate commerce, particularly where such taxpayers, like the [petitioners] are earning substantial income from their business activities in Massachusetts and where the common usage of computer

technology and specialized software has eased the administrative burdens of tax compliance.

*Id.*

Having failed to convince the SJC of an "undue burden" on commerce, petitioner and *amici curiae* now flood the Court with a new round of speculation about the impact of the nexus rule upheld in this case. But speculation does not establish clear proof that this case is of such "gravity and importance" as to warrant review by this Court. *See In Re Woods*, 143 U.S. 202, 206 (1892).

As the party urging a new rule of physical presence for corporate income taxes, petitioner has the burden to show an impact requiring intervention by this Court. Petitioner has not met its burden. It grossly exaggerates when it claims that the rule applied by the SJC will have "severe economic implications." Pet. 33. As petitioner concedes, taxpayers selling tangible goods, if they have no physical presence in the taxing State, may be protected from tax by P.L. 86-272, 15 U.S.C. § 381. Similarly, small and medium size businesses may be protected by (1) statutory thresholds protecting *de minimis* contacts or (2) the Due Process Clause.

Nor is plenary review supported by petitioner's statement that "many administrative . . . decisions on the question have been issued by other States." Pet. 5 n.1. Petitioner does not cite new litigation or practical problems arising from these developments, thus tending to prove that the approach is workable and not unduly burdensome.

If issues later arise, they should be allowed to proceed through the state courts, where records could be developed to allow for full consideration of the alleged burdens of compliance. It is premature, however, to conclude that recent state actions will produce a conflict of authority requiring intervention by this Court.

Finally, petitioner's claims about burdens on commerce ignore the other restraints imposed by the Commerce Clause, *viz.*, the requirements that any tax be fairly apportioned, non-discriminatory, and fairly related to a State's services. These other tests under *Complete Auto* address many of the specters that petitioners and *amici curiae* conjure in arguing for a physical presence requirement for nexus. The petition and the briefs of the *amici curiae* ignore the fact that issues regarding discrimination and multiple taxation are separate and distinct from nexus. These separate claims against state taxation do not support review of the nexus question presented in this case.[3]

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[3] Petitioner argues that a "physical presence" rule is preferable to the rule applied by the SJC because the physical presence test alone is a "bright line" rule. But decisions of state courts demonstrate that the physical presence test has its own ambiguities. *See, e.g., Dell Catalog Sales*, 199 P.3d 863 (N.M. Ct. App. 2008), *cert. denied*, 129 S.Ct. 1616 (2009).

### B. The Alleged Impact on Foreign Commerce Was Not Raised Below and In Any Event Does Not Support Review by this Court.

Petitioner also argues that the "economic nexus standard has adverse global implications." Pet. 36-38. Petitioner made no claim under the Foreign Commerce Clause in the SJC. *See Brief for Geoffrey, Inc., Appellant*, 2008 WL 4359876 (January 31, 2008). "In cases coming [to the Court] from state courts, there are reasons of peculiar force which should lead [the Court] to refrain from deciding questions not presented or decided in the highest court of the state . . . ." *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940). Even if petitioner has preserved the issue, or merely cites the alleged impact on foreign commerce as evidence of the importance of the question presented, its argument does not support plenary review. Such arguments by petitioners and *amici curiae* have not been documented or examined in these proceedings. If a foreign corporation later challenges a tax on such grounds, it may create a full record and seek review by this Court at that time. Meanwhile, as explained below, the policy arguments made by the petition should be addressed to Congress, not the Court.

## IV. THE COURT SHOULD DENY THE PETITION IN DEFERENCE TO THE CONSTITUTIONAL ROLE OF CONGRESS IN WEIGHING BURDENS ON INTERSTATE COMMERCE.

Petitioner argues that "[a]bsent clear guidance from this Court," there will be adverse economic effects on multi-state businesses. Pet. 34. To the contrary, the Court should deny the petition because the issue presented is better decided by Congress, which this Court has said has power under the Commerce Clause to "evaluate the burdens that taxes impose on interstate commerce." *Quill*, 504 U.S. at 36. Whatever ruling that this Court might make on the merits of the issue presented here, "Congress remains free to disagree with [the Court's] conclusions." *Id.* As petitioner notes (Pet. 27 n.5), Congress has enacted limitations on state taxation. *See, e.g.*, 15 U.S.C. § 381; 15 U.S.C. § 391; 49 U.S.C. § 11501. Regarding the issue presented here, Congress has for at least eight years considered bills directly addressing the issue, including a bill pending in the current session of Congress. Business Activity Tax Simplification Act of 2009, H.R. 1083, 111th Cong. (2009).

Despite these legislative vehicles for action, petitioner states that "Congress has given no indication in the nearly two decades since Quill" that it "intends to follow up . . . ." Pet. 5. But this point ignores the most important inference from the fact of the bills: they show that the issue presented is by its nature one that Congress is "better qualified to

resolve." *Quill*, 504 U.S. at 318 and n.11. Thus, in *Quill* the Court cited unenacted bills in its discussion of Congress's relative competence regarding the same issues. The Court recognized that Congress is "better qualified" to conduct a full study of the relevant factors, including alleged burdens on business and likely fiscal impacts on the States. These issues are ones involving legislative fact. They are better weighed by Congress in hearings, reports, and debates. *See, e.g., Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills Before Special Subcomm. On State Taxation of Interstate Commerce of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966). Where, as here, taxpayers seek a broad exemption from tax, Congress is better qualified to judge the impact of the exemption on other commerce and other types of state taxation.

Petitioner cites business "uncertainty" that is "costly" and "inhibits strategic business planning" (Pet. 34), but these factors are by their nature legislative facts that Congress is well suited to weigh. Judicial review of the same questions, in contrast, is necessarily limited by the four-corners of a judicial record and the retrospective cast of a lawsuit. Judicial conclusions about respective burdens will necessarily be both limited and speculative. The Court has warned that the judiciary "must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to

summarize." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 445 (1940). For these reasons, the Court should defer to the legislative role expressly conferred on Congress by the Commerce Clause.

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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